

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BENJAMIN WALKER,

Petitioner,

v.

PETER HUIBREGTSE, Warden,

Respondent.

ORDER

10-cv-692-bbc

On January 10, 2011, I dismissed petitioner Benjamin Walker's petition for a writ of habeas corpus under 28 U.S.C. § 2254 without prejudice for his failure to exhaust his state court remedies. I denied his motion for reconsideration on January 26, 2011. Now, petitioner has filed a notice of appeal and a request to proceed in forma pauperis on appeal. I will take up those matters, as well as petitioner's entitlement to a certificate of appealability.

Petitioner's appeal is not subject to the 1996 Prison Litigation Reform Act. Walker v. O'Brien, 216 F.3d 626, 628-629 (7th Cir. 2000) ("the PLRA does not apply to any requests for collateral relief under 28 U.S.C. §§ 2241, 2254, or 2255"). Nevertheless, in

determining whether a petitioner is eligible for indigent status on appeal under 28 U.S.C. § 1915, the court must find both that the petitioner does not have the means to pay the \$455 fee for filing his appeal and that the appeal is taken in good faith. 28 U.S.C. § 1915(a)(1) and (3). I do not intend to certify that petitioner's appeal is not taken in good faith.

In determining whether a habeas corpus petitioner is eligible for pauper status, the court applies the formula set out in 28 U.S.C. § 1915(b)(1). Specifically, from the petitioner's trust fund account statement for the six-month period immediately preceding the filing of his appeal, I add the deposits made to petitioner's account and calculate 20% of the greater of the average monthly deposits or the average monthly balance in the account. If the 20% figure is more than the fee petitioner owes for filing his appeal, he may not proceed in forma pauperis. If the 20% figure is less than \$455, he must prepay whatever portion of the fee the calculation yields.

From the trust fund account statement that petitioner has submitted, I conclude that he is unable to prepay any initial partial payment of his appeal fee. Therefore, I will grant his request to proceed in forma pauperis on appeal.

As to the certificate of appealability, a certificate shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that "are debatable among jurists of reason; that a court

could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). "[T]he standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding." Walker v. O'Brien, 216 F.3d 626, 631 (7th Cir. 2000).

I dismissed petitioner's petition without prejudice for his failure to exhaust his state court remedies before bringing his petition this court. Because reasonable jurists would not disagree about this conclusion, I must deny petitioner's request for a certificate of appealability.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is GRANTED.

FURTHER, IT IS ORDERED that petitioner's request for a certificate of appeal is
DENIED.

Entered this 28th day of February, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge